Matanuska Electric Association, Inc. *and* International Brotherhood of Electrical Workers, Local 1547, affiliated with International Brotherhood of Electrical Workers, AFL–CIO. Case 19–CA–26525

June 13, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS COWEN AND BARTLETT

On August 29, 2001, Administrative Law Judge James L. Rose issued the attached decision. The Charging Party filed exceptions and a supporting brief. The Respondent filed an answering brief, and the Charging Party filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings, and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, and the complaint is dismissed.

Dated, Washington, D.C. June 13, 2002

Peter J. Hurtgen, Chairman

William B. Cowen, Member

Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] None of the members of the panel deciding the instant case was on the panel that decided *Royal Motor Sales*, 329 NLRB 760 (1999), the case cited by the judge in his impasse analysis. The panel does not pass on the correctness of the decision in *Royal Motor Sales*.

Nia Renei Cottrell, Esq., for the General Counsel.
William F. Mede and *Thomas P. Owens, Jr. Esqs.*, of Anchorage, Alaska, for the Respondent.
Laurie Constantino, Esq., of Anchorage, Alaska, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Anchorage, Alaska, on May 22–24, 2001, on the General Counsel's complaint which alleged that the Respondent (sometimes MEA) engaged in conduct violative of its duty to bargain and unlawfully implemented its collective-bargaining proposal all in violation of Section 8(a)(5) of the National Labor Relations Act, as amended, 29 U.S.C. §151, et seq.

The Respondent generally denied that it committed any violations of the Act and affirmatively contends that prior to implementing its final proposal, the parties had reached an impasse in negotiations or if not, by the actions of the Charging Party during bargaining the Respondent was permitted to implement its final proposal.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following findings of fact, conclusions of law, and recommended Order.

I. JURISDICTION

The Respondent is an electrical power utility serving customers in an area north of Anchorage, Alaska, with its principal office at Palmer, Alaska. During course and conduct of its business, the Respondent annually purchases goods, products and materials directly from points outside the State of Alaska valued in excess of $5000 and annually receives gross revenues in excess of $250,000. The Respondent admits, and I conclude that it is an employer engaged in interstate commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Electrical Workers, Local 1547, affiliated with International Brotherhood of Electrical Workers, AFL–CIO (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Factual Overview

The Respondent has about 120 employees in four bargaining units, all of which are represented by the Union. The Union and the Respondent have had a bargaining relationship for about 40 years and have negotiated many collective-bargaining agreements covering these units. For reasons not fully explained in the record, since late 1998 the parties have been engaged in "open warfare" and this has resulted in extensive litigation involving all the units; however, this matter concerns only the "outside unit"—the 30 linemen/wiremen, meter readers, mechanics, and others.

The last agreement prior to the events here covering the outside unit was due to expire on December 31, 1998, however, it was extended by agreement during negotiations for a successor until the Respondent implemented its final proposal on June 3,

1999.[3] On February 28, 2001, the parties executed a successor agreement.

The parties exchanged aggressive reopener letters and on November 10, 1998, had their first meeting. Thereafter they met 23 times in formal sessions until June 8, and had numerous "sidebar" or informal meetings between the Union's principal negotiator, Larry De Peal (and later its attorney, Laurie Otto, now Constantino) and William Mede, the Respondent's principal spokesperson.

From the beginning the Respondent informed the Union that there would have to be changes in its ability to subcontract work and that all past practices would have to be eliminated. The Respondent argued that the current language on mutual determination and loss of work gave the Union a virtual veto on its ability to subcontract. And the Union seemed to have a superior institutional memory of past practices. On this, the Union had filed something like 75 grievances during the course of the contract, 27 of which went to arbitration, with the Union winning, or partially winning, 20 due to the believability of its position on the past practice.

The Union consistently took the position that it would agree to no changes in the subcontracting language. Indeed it proposed even more restrictive language. And it consistently refused to agree to language eliminating past practices.

Both parties agree that these were the two critical issues in negotiations. In fact, Mede told DePeal that the Respondent would take a strike rather than keep the current contracting language or to keep past practices.

In a sidebar meeting in early January between DePeal and Mede, they agreed that if these two issues were resolved, the rest of the contract, including wages and benefits, would fall into place. However, these issues were not resolved, nor was any movement made by either side on them. The parties did make tentative agreements to about 50 less important clauses.

As will discussed in more detail below, basically the Respondent stated that "all" past practices would have to be eliminated; and suggested a "Davis-Bacon approach" to subcontracting, whereby, presumably, the "prevailing wage" would be that set forth in the parties' collective-bargaining agreement and would have to be paid by the subcontractor.

Given the Union's consistent and adamant rejection of the Respondent's proposals on these two issues, on April 12, the Respondent declared an impasse. This was rescinded 2 days later when the Union agreed to further bargaining sessions, and the parties continued to meet in late April and on May 6 and 20. And in subsequent sidebar discussions, Union made substantial movement on both issues. On May 27, DePeal wrote Thomas Owens, who was substituting for Mede at the time, requesting the Respondent agree to four meetings in June and requesting certain information. The Respondent agreed to meet on June 8, but then in a letter dated June 1, to Bob Zehnder (who had just taken over from DePeal as the Union's chief negotiator), Mede stated that in his opinion "further bargaining would be futile and not likely to produce an agreement." Thus he said MEA intended to implement its April 29 proposal on June 3, but nevertheless agreed to meet on June 8, as scheduled, to explore whether the deadlock could be broken.

The Respondent did in fact implement its April 29 proposal and the parties did meet on June 8, for a short time, but no agreement was reached. Ultimately, the parties did execute a collective-bargaining agreement, but the process leading to its agreement is not a part of this record.

B. Analysis and Concluding Findings

For decision in this proceeding are 11 allegations arguably demonstrating that the Respondent engaged in overall bad-faith bargaining from and after December 2, 1998. Though unclear, it does not appear that the General Counsel contends that any of these 11 allegations is per se a violation of Section 8(a)(5). Rather, they allegedly evidence a totality of conduct designed to frustrate good-faith bargaining. As the Board said in *Altorfer Machinery Co.*, 332 NLRB No. 12 (2000), citing *Atlanta Hilton & Tower*, 271 NLRB 1600 (1984), "good faith or the lack of it depends upon a factual determination based on overall conduct." The Respondent contends that these 11 specific acts did not occur. Many of these assertions are redundant, nevertheless they will be considered separately, seriatim as they appear in the complaint.

In addition, it is alleged that the Respondent unlawfully implemented the April 29 proposal. The Respondent argues that either the parties were at an impasse in negotiations or by its actions the Union made further bargaining futile therefore it was permitted to implement its final offer.

1. Refused to explain or answer questions about its proposal.

This allegation, I conclude, is not supported by credible evidence. Thus, DePeal testified that during the first 3 or 4 days of negotiations, the parties "walked through" the Respondent's proposal so "we knew where the—where the MEA was coming from." DePeal went on to testify that Mede explained some but not all of the MEA proposals and answered some but not all of the Union's questions. In his letter of April 20, DePeal wrote: "For the very first time since negotiations began, MEA was willing to clearly explain its reasons for seeking specific language changes in the collective bargaining agreement, and to identify its intent on a section-by-section basis."

DePeal admitted that at various times throughout the negotiations MEA explained its position on an issue and DePeal stated that the Union understood. And in bargaining notes there are repeated references that DePeal said the Union understood the Respondent's position on a proposal. Given the extensive bargaining notes in evidence, I cannot accept so much of DePeal's unreferenced and general testimony that sometimes the Respondent did not explain or answer specific questions.

I reject and discredit the testimony of Constantino that the Respondent refused to answer specific questions at the April 29 meeting; but even if this occurred as she testified, such does not negate DePeal's testimony that in fact throughout negotiations MEA was responsive. I note that Constantino was a late comer to the negotiations, as was Owens. Though new personalities were inserted into negotiations, the fact remains that by April 29, the parties had met 19 times in formal sessions and numerous times informally.

Demanding answers to innumerable questions about each proposal, Constantino testified, was "collective bargaining 101." Owens referred to such as "twenty questions," "filibustering," and "slow rolling."

I believe, and conclude, that the Union's statements in letters and meetings that the Respondent refused to answer questions was posturing and not supported by credible evidence. To the contrary, I believe that the Union's negotiators well knew throughout negotiations what the Respondent had in mind with

[3] All dates are in 1999, unless otherwise indicated.

the proposed contract changes, particularly on the two key issues.

2. Demanded and insisted that all Union questions concerning Respondent's proposals be in writing, as would any responses from Respondent

Again, the testimony of DePeal and the bargaining notes do not support this allegation. DePeal agreed that throughout negotiations the Respondent answered the Union's questions without demanding that they be put in writing, even assuming such would be evidence of bad faith.

The parties do agree that during the May 20 meeting Owens told the Union: "I'll give same answer to every question—she'll (Constantino) ask what did you intend and I'll say whatever the words say, every question will get the same answer—you can make a list of questions that we might answer." He further said: "As far as curing your lack of understanding or professed lack of understanding to what is on the table, we are willing to bargain with you about that by specific written questions about the language you not understand. We will give you back a concise, prompt, written clarification answer."

This occurred after months of bargaining, wherein the Respondent's negotiators in fact answered questions about specific proposals. Based on the total record, I do not credit the assertion by the General Counsel and Union that all the questions asked by Constantino were in fact a good-faith effort to understand the Respondent's proposal. The bargaining notes reveal that questioning was a tactic and not a serious effort, in most cases, to gather information. The total record does not establish that by demanding written questions the Respondent evidenced its bad faith in bargaining.

3. Made blanket negative responses to all of the Union's individual proposals or requests to discuss individual proposals, while insisting that the Union present only entire packages that Respondent could accept or reject as a unit

According to DePeal's testimony, as confirmed by the bargaining notes, this assertion did not happen. In fact throughout negotiations, the Union made individual proposals which were considered and the parties reached tentative agreement on some 50 contract clauses.

During the later stages of negotiations, characterized by Owens as the "end game," the Respondent did suggest that each party submit to the other a comprehensive "concept" proposal, which if accepted in its entirety, then the parties could negotiate specific language. The concept proposals are sometimes referred to in the record as a "got to have list." The Respondent further stated that if the Union refused to accept its concept proposal in its entirety, then the parties would revert to the last formal proposal for continued negotiations.

After about 6 months of negotiations such does not seem to be an unreasonable position, nor does such suggest that the Respondent was not bargaining in good faith.

4. Refused to consider anything other than a complete proposal package from the Union, or to discuss individual elements, or to discuss tentative agreement to individual elements

This allegation is not supported even by the testimony of the General Counsel's witnesses or the Joint Exhibits. In fact, as DePeal wrote in his May 19 letter to the Respondent, the parties exchanged proposals then in negotiations they discussed the contract section by section, tentatively agreeing to many sections. The parties made tentative agreement to 50 sections, the last of which was made on April 29.

Again, only in the latter stages did the idea of dealing in package proposals arise. Thus on April 5, the Union submitted a "Package Proposal." And, the Union submitted another package proposal with its May 19 letter.

The fact that after 6 months of negotiations on a section by section basis both parties sought to deal in package proposals does not demonstrate an intent on the part of the Respondent not to reach an agreement.

5. Took a "take it, or leave it" stance in negotiations

DePeal testified that the Respondent in fact moved off its original proposal on several sections and the parties in fact reached tentative agreements. Importantly, on the critical issue of eliminating past practices, when the Union changed its position, it proposed language different from that proposed by the Respondent, which the Respondent stated it would accept. The totality of the record here simply does not establish that the Respondent took a "take it, or leave it" stance in negotiations.

6. Refused to consider union concessions during negotiations.

Apparently this allegation is based on the General Counsel's understanding of the posture of negotiations in May. At that time both parties had presented formal proposals and each had presented a package proposal. Both sides took the position that their respective package proposal had to be accepted by the other in total, and if not they would return to the formal proposals.

In its package proposal the Union, for the first time, made concessions on subcontracting and past practices, though in previous sidebar discussions union negotiators stated they were willing to move on these issues. Again, however, the Union clearly stated to the Respondent that these concessions were part of a total package. While the Respondent did indicate acceptance of the proposed past practice language, it was not required to accept the Union's package proposal. E.g., *J&C Towing Co.*, 307 NLRB 189 (1992). The fact that the Respondent did not accept the Union's package does not imply that it was not considered.

7. Repeatedly, falsely, and in bad faith, declared impasses

On April 12, Mede wrote DePeal stating that due to a lack of movement on significant issues and the Union's refusal to meet between April 9 and 29, the Respondent considered negotiations at a impasse. Given that the parties had bargained off and on for 5 months and their respective positions on the admittedly two critical issues remained fixed, that there was an impasse was not an unreasonable conclusion. Nevertheless, following DePeal's reply of April 13, on April 14 Owens wrote that the impasse had been rescinded and the parties scheduled four subsequent meetings.

Then after meetings in April and May and the exchange of concept proposals, on June 1, Mede wrote that "further bargaining would be futile and not likely to produce and agreement." Thus Mede stated the Respondent's intention to implement its final (April 29) offer on June 3.

Whether there has been an impasse in negotiations is a subject repeatedly treated by the Board and courts. E.g., *Taft Broadcasting Corp.*, 163 NLRB 475 (1967); *Tom Ryan Distributors, Inc.*, 314 NLRB 600 (1994); *Royal Motor Sales*, 329 NLRB 760 (1999) (noting that impasse is all most always a

temporary deadlock which is eventually broken). Impasse in negotiations is a fact specific determination that further bargaining would be futile, and absent some intervening act (for instance economic pressure) there is no reasonable likelihood of the parties reaching an agreement.

In *Taft*, the Board said that impasse is a matter of judgement that at the time continuation of bargaining would not likely cumulate in the parties reaching an agreement. Relevant factors to be considered are the parties' bargaining history, the importance of the issues separating them and their contemporaneous understanding as to the state of negotiations (not that both had to agree there was an impasse). The Board noted that the existence of other unresolved issues does not negate the existence of impasse. "a deadlock is still a deadlock whether produced by one or a number of significant and unresolved differences in positions." 163 NLRB at 478.

Given the significance of the two principal issues and the parties' respective adamant positions, regardless of other tentative agreements and concessions, and other unresolved issues, they were unlikely to reach an agreement when on April 12, Mede wrote that they were at an impasse.

While the determination of impasse was unilateral, the basis for it was mutual—the opposing and intransigent positions on eliminating past practices and changing subcontracting language. I therefore conclude that Mede's announcement of impasse was neither false nor in bad faith.

In May the Union stated its willingness to move on both issues. The Respondent argues that this announcement was merely in sidebar discussions. Since the Union made no changes in its formal proposal, there was impasse. I do not accept this argument. Such would give dominance to form over substance. Whether formal or sidebar, statements of position and declarations of movement on important issues must all be considered when evaluating whether there is a likelihood of reaching an agreement.

But the Union's statement that it no longer adhered to its position on these two issues was questionable. Notwithstanding that the Respondent had proposed substantial changes in the existing contract, DePeal agreed that if the parties were able to resolve the past practices and subcontracting issues, the rest of the contract would fall into place. The Respondent's concept list included the Union's proposed language on past practices and a Davis-Bacon approach on subcontracting. But the rest of the contract did not fall into place. Indeed the Union rejected the Respondent's concept proposal and then approached negotiations in a more stringent and less compromising manner.

In rejecting the Respondent's concept proposal, DePeal claimed (and the General Counsel argues) that the "got to have list" included 112 items (the last being a proposed global settlement of all litigation and was withdrawn at the May 20 meeting). I count 21 changes from its April 29 proposal, most of which appear minor. The Respondent argues, and I conclude, that its "got to have list" included all items necessary to a complete collective-bargaining agreement and was, as to the minor issues, similar to the Union's concept proposal of May 19.

During the first several months of negotiations, the Union's principal negotiator stated that he understood the various proposals of the Respondent. However, in May, the Union began asking innumerable questions about each proposal. I conclude that the Union's posturing could only have been for the purpose of delaying finalization of an agreement. That protracted negotiations were at the core of the Union's agenda is demonstrated by Counsel's statement in her brief that "the speed of negotiations was consistent with prior negotiations between the parties, both in the Outside and other bargaining units. For example, the record reflects that IS negotiations between MEA and IBEW had been on-going for more than 10 years, with approximately 10 relatively simple contract changes on the table, and that negotiations between MEA and IBEW for an Eklutna agreement had also been ongoing for over 2 years. In short, the Outside negotiations were proceeding at a normal and consistent pace, until MEA began bargaining in bad faith." Counsel refers to the Respondent's desire to conclude a contract before the construction season began as "needing to complete negotiations more quickly than normal."

In his May 19 letter, DePeal stated that "(n)egotiations proceeded in this straight-forward and productive manner until March 1999, when MEA began aggressively pushing for an unreasonably accelerated pace in negotiations." In fact the Union had refused to meet at all between February 18 and March 25, and again between April 9 and 29 on grounds that DePeal was too busy. The Respondent's charge of bad-faith bargaining was dismissed by the Acting Regional Director (affirmed on appeal) with the caveat "that the Union could have been more diligent in scheduling meetings for the Outside unit in March and April."

Regardless of what might or might not have been occurring with regard to other bargaining units, given the parties 40 bargaining history, I conclude that 7 months was ample time to complete a contract in the absence of impasse on substantive issues, had there been a serious desire to do so.

The threat of stalling negotiations was stated by De Peal in his letter to the Respondent of May 20, when he wrote "it will be necessary for MEA to explain its reasons and motivations for seeking specific amendments in the collective bargaining agreement, and for the parties to bargain over those amendments." As an attachment, he listed 29 clauses which "IBEW requires explanation of the following MEA Outside Proposals which have never been explained by MEA."

The Union began taking the position that all words are ambiguous, therefore to have a bargaining history for purposes of future grievance litigation, the Union wanted the Respondent's intent and motivation explained. The Respondent took the position that the words proposed mean what they mean. In negotiations, the Respondent did not say that it was opposed to bargaining history, but only that it need not answer repeated questions about clauses which have a plain meaning. Further, even while claiming movement on the critical issues in his May 19 letter, DePeal wrote "Moreover, IBEW continues to wait for an answer from MEA on the information request IBEW submitted over MEA's proposed past practice section and anticipates the need for extensive negotiations over this proposed section." Such seems to belie an intent to reach an agreement without protracted negotiations on a clause it states it capitulated to the Respondent.

In a recent, complicated and extensive ruling on impasse, the Board held that the test of whether there is a genuine impasse is whether the union indicated its willingness to move on the critical issues such as to suggest the possibility of reaching an agreement. *Royal Motor Sales*, supra. Nothing in *Anderson* suggests that impasse has to be mutually agreed to, notwithstanding some language to the contrary in *Ryan.* I note also that the Board indicated that "delay and obfuscation" can be a basis for impasse, though finding, contrary to the judge, such

not to be case. Finally, in reversing the judge's finding of impasse in *Anderson*, the Board concluded that the respondent did not explore the union's movement on the critical issue and its declaration of impasse occurred in the context of unfair labor practices.

Here the Union did change its adamant position on past practices (while demanding extensive information and declaring the necessity for "extensive negotiations" on this clause) and to an extent moved on subcontracting, though its new position was a long way from capitulation. In its May 19 package proposal, the Union offered, "signatory to IBEW or pay 'State Davis Bacon.' Delete 'mutual determination'. . . ." Though apparently representing a change in position, this proposal was still far from the Respondent's offer, given the Union's understanding of "State Davis Bacon."

Nevertheless, unlike *Anderson*, while declaring impasse, the Respondent left the door open to consider the Union's new position when Mede wrote on June 11, "MEA remains willing to continue to bargain with the union in an effort to break the impasse. If IBEW wishes to attempt to break the impasse, it should submit a complete package proposal to MEA. MEA will be willing to schedule another bargaining session if it receives a package proposal from IBEW which contains significant changes from IBEW's current proposal, suggesting that further bargaining would be productive." The Union did not respond to this letter.

On these facts, I conclude that the parties were in fact at an impasse when negotiations concluded in May. At best, the Union had simply traded one intransigent position, on past practices and subcontracting, for another, the form of bargaining.

8. Refused to provide written copies of past practices known to it, while insisting that the Union agree to the blanket abolition of all past practices

Repeatedly, during discussions of the Respondent's proposal to eliminate all past practices, the union negotiators would ask for a list of those past practices. The Respondent's negotiators would decline to furnish such a list, stating that "all" means "all" and to make out a list would risk leaving out a practice known to some employee but unknown to, or not remembered by, management. However, as early as November 1998, the Respondent's negotiators did suggest that if the Union had in mind a specific past practice it wanted to keep, to make such a proposal and the Respondent would negotiate concerning it. The Union did not do so, always insisting that the Respondent list those past practices it meant by "all" and demanding all bargaining notes and other documents from the time the Union was certified (about 40 years) which could define a past practice.

I do not comprehend how the Respondent's position demonstrates a refusal to bargain in good faith. To the contrary, the Union's apparent inability to understand the word "all" and its insistence on a comprehensive list does not seem calculated to move in the direction of reaching an agreement.

9. Refused to accept any tentative agreements, unless such tentative agreements were linked to an entire "package," while refusing to identify the nature of such packages

It is unclear exactly what the General Counsel contends by this allegation. In fact the parties had tentative agreements which were included in the Respondent's April 29 proposal. They were never in issue. Further, there can be no doubt what the Respondent was proposing. There was the April 29 formal proposal and the May 20 concept proposal

10. Refused, while physically present at the bargaining table, to set dates for further bargaining, and insisted that the Union request dates by mail for further bargaining.

According to DePeal's bargaining notes, the May 20 meeting was scheduled for noon to 4 p.m. He wrote that the meeting adjourned at 3:55 and "MEA walked out. Would not set up further dates. Said to write a letter and ask for dates." The Respondent does not dispute this, noting only that the scheduled time had practically expired and the Respondent considered that the Union's negotiators were "playing games" in asking repeated questions about every aspect of the Respondent's proposals. Therefore, in response to the Union's request for additional bargaining dates, Owens said to write a letter. This occurred only at the last substantive bargaining session before the Respondent declared impasse. During the previous 7 months, the parties typically set future bargaining dates (which the Union often did not meet for a variety of reasons).

11. Interjected new language in its subcontracting proposal after the Union had accepted Respondent's subcontracting language

The General Counsel argues that the Respondent changed its position on subcontracting, first offering "Davis-Bacon" language and then, after the Union agreed, said this meant something other than the common understanding Davis-Bacon. Without proof, the General Counsel states: "Davis-Bacon as commonly understood would encompass not only the wages and pension amounts equivalent to those of Respondent's Unit employees, but would also include health and welfare contributions, and other benefits, in establishing the pay-rate of subcontractor employees."

In general, "(t)he Davis-Bacon Act (40 U.S.C. § 276a et seq.) requires that the wages of workmen on a Government construction project shall be 'not less' than the 'minimum wages' specified in a schedule furnished by the Secretary of Labor. The schedule 'shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing' for corresponding work on similar projects in the area." *United States v. Binghamton Construction Co.*, 347 U.S. 171, 172 (1954). Though individuals dealing in labor law might know Davis-Bacon to be a prevailing wage law in the construction industry, I doubt that the total impact of the Davis-Bacon Act is common knowledge, particularly among those involved in other industries, such electrical power distribution. Further, there is no evidence what the Union's proposed "State Davis Bacon" might encompass.

Beyond that, I credit the Respondent's witnesses that they suggested one possible resolution to the subcontracting issue would be a "Davis-Bacon approach." By this the Respondent would agree that any subcontractor would have to pay the wages and pension benefits enjoyed by unit employees. Such would seem to meet the potential worry that the Respondent would subcontract to employers who undercut the Union's wages. In fact Constantino agreed that at the May 20 session, Owens said he used the term "Davis-Bacon" as a label for a concept and that MEA was willing to agree to restrict its right to subcontract by placing certain compensation limits on the successful contractor.

This might not have been sufficient for the Union and could have been the basis of negotiation but I do not believe that the Respondent's understanding of a Davis-Bacon approach was "idiosyncratic" as the General Counsel and Union argue. I do not believe that the Respondent reneged on subcontracting language agreed to by the Union.

Finally, DePeal testified that he was unaware that the Union in fact accepted the Respondent's proposal on subcontracting. I therefore conclude that the credible evidence does not support this fact allegation.

12. Unilaterally implementing its contract proposal at a time when the parties were not at impasse and the Respondent had not bargained in good faith

Since the parties have now concluded a collective-bargaining agreement, the principal issue in this matter is whether the Respondent's June 3 implementation of its April 29 proposal was unlawful. The General Counsel argues it was because the parties were not at impasse in negotiations and the Respondent had been bargaining in bad faith. The Respondent argues that the implementation was lawful since the parties were at impasse, and even if not, by its actions the Union made reaching an agreement unlikely.

An employer cannot change terms and conditions of employment of its represented employees unless it and the union representing them have reached an overall impasse in negotiations. *Taft Broadcasting Corp.*, supra. However, where there is a genuine impasse in negotiations or the union has engaged in conduct which prevents agreement, then the employer can lawfully implement terms and conditions of employment it has offered in negotiations. *E.g., M&M Building & Electrical Contractors, Inc.*, 262 NLRB 1472 (1982); *Jefferson Smurfit Corp.*, 311 NLRB 41 (1993).

Though the question of impasse here is difficult, for the reasons given above, I conclude that Union's bargaining tactics made reaching an agreement a virtual impossibility. I conclude that the Respondent had no reason to believe that the Union would change tactics in the foreseeable future and therefore was permitted to declare impasse and implement its final offer.

I conclude that the Respondent did not bargain in bad faith and did not violate the Act by declaring impasse in negotiations and implementing its April 29 proposal on June 3. Accordingly, I conclude that the complaint should be dismissed in its entirety.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [4]

ORDER

The complaint is dismissed in its entirety.

Dated, San Francisco, California, August 29, 2001[5]

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5]